No. 83-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MICHAEL ANGELO MELDISH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO THE UNITED STATES BRIEF IN OPPOSITION

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TABLE OF CONTENTS

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Factual misstatements, inclusion of irrelevant prejudicial materials, and legal distortions in the United States Brief in Opposition necessitate this brief reply on behalf of petitioner.

1. The first issue in this case is the effect under the Gun Control Act of 1968 of convictions for violation of 18 U.S.C. §542, the provision in the Customs chapter of the Federal Criminal Code which proscribes false statements

in connection with the importation of goods into the United States. Petitioner contends that such offenses are not predicate offenses under the Gun Control Act and, therefore, petitioner committed no crime when he purchased hunting weapons.

The government's primary response in its Brief in Opposition argues *smuggling* is a predicate offense under the Gun Control Act and that petitioner had been convicted of *smuggling*. The Question Presented, as phrased by the government, is "whether a prior conviction for *smuggling* a watch into the United States ..." is a predicate offense (Br. in Opp. i)(emphasis supplied). Repeatedly in its brief, the government refers to smuggling and smuggled goods. Describing petitioner's prior offense, the government declared that petitioner had "attempted to smuggle a $9,000 ladies wrist watch..."(Br. in Opp. 8 n. 7). The government asserts that petitioner's "furtive smuggling attempt" failed: "when threatened with a full body search, petitioner finally produced the watch..." (*Ibid.*).

As the government is well aware, petitioner has never been convicted of the offense of smuggling or attempting to smuggle goods into the United States. Smuggling as an offense is defined by 18 U.S.C. §545. Petitioner has no prior conviction for violation of § 545. Petitioner's sole previous conviction is for violation of an entirely different offense. The mischaracterization of the legal record is a blatant attempt by the government to prejudice petitioner in the eyes of this Court.

Not content with legal distortion, the government fabricates a factual scenario of petitioner's furtive smuggling attempt being foiled by imminent threat of a full body search. This can only be characterized as a vicious lie. As support for its calumny, the government does not

cite the record in this case, because there is nothing in the record of this case to support that statement.[1] The government does not cite the record in petitioner's prior prosecution, because there is nothing in the record of that case to support the government's lie. Indeed, the record in that case refutes the government's prejudicial misrepresentations.[2] The only source cited by the government for its factual assertions is "Government's Sentencing Memorandum 18" (*Ibid.*), a document containing matters not tested for accuracy by trial.

Adding to its legal distortion and factual misrepresentations, the government crudely misstates petitioner's arguement in this Court. Petitioner contends that the main purpose of the Customs laws is to regulate international trade and that Customs duties are imposed to protect manufacturers from unfair or destructive competition by importers of foreign made goods. (Pet. 7-8). Section 542 is part of that regulatory pattern. Therefore, petitioner

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[1] The record in the present case shows, by stipulation of the parties, that petitioner had been convicted in 1978 of making a false or fraudulent Customs declaration in violation of 18 U.S.C. § 542 (A 153).

[2] Prior to petitioner's trial on the Customs offense charge, a motion to suppress evidence seized by the Customs agents was heard on January 27, 1978 in the United States District Court for the Eastern District of Virginia, sitting in Alexandria, Virginia. (Criminal No. 77-364-A). The Customs agent testified that he had asked petitioner whether there was anything else that he wanted to declare and, immediately, petitioner took the wristwatch from his pocket and said that he had forgotten to list it. The district court denied the pretrial suppression motion on the ground *inter alia* that petitioner had voluntarily produced the watch.

argues that his prior conviction is an offense "pertaining to antitrust violations, unfair trade practices, [and] restraints of trade," the language in the exemption provision of the Gun Control Act. The government misstates petitioner's argument to be that "the customs laws were designed *solely* to protect domestic goods from unfair foreign competition" (Br. in Opp. 3)(emphasis supplied).[3] By so doing, the government no doubt hopes to deny petitioner's position credibility in this Court.

The gist of the government's argument is that Customs laws, and particularly § 542, have *no* function in protecting domestic goods from unfair foreign competition. The government observes that conviction of a violation of § 542 does not require proof of any adverse effect on competition or consumers. In the government's view, this is conclusive evidence that Congress, in designing the Customs laws, had no concern about the effect of imported goods on marketing of products manufactured in this country. This is arrogant nonsense. The legislative purpose of the Customs laws as a device to regulate international trade is indisputable. What matters is not the element of the offense Congress created to aid in enforcement of the Customs laws, but the manifest purpose that comprehends those laws as means of trade regulation.

The government's argument is contradicted by the position of the Treasury Department with respect to the indictment of Sears, Roebuck & Company, a position that

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[3] Compare the Petition for Certiorari: "While the Customs laws of the United State have a minor revenue purpose, their principal object is to regulate business practices of international trade" (Pet. 7). A footnote to this sentence describes the minimal revenues obtained from the Customs laws.

the government does not disavow in this Court. Sears and petitioner were both charged with making a false or fraudulent statement in connection with the importation of goods. The charges in both cases were laid under 18 U.S.C. § 542. The Treasury Department's Bureau of Alcohol, Tobacco and Firearms ruled that Sears' violation of § 542 is not a predicate offense under the Gun Control Act. Sears continues to be licensed to receive and sell firearms.[4] The Sears case demonstrates conclusively that a violation of the Customs offense set forth in 18 U.S.C. 542 is exempted from the scope of predicate offenses under the Gun Control Act.

Forced to concede that Sears § 542 offense is not a predicate offense under the Gun Control Act, the government argues that the exemption of Sears turns upon particular facts of that case, facts not present in petitioner's case. Sears, it appears, was importing television sets whose value was falsely represented for Customs purposes by concealing $1.1 million in illegal rebates from the Japanese manufacturer (Br. in Opp. 5 n 4). The sheer volume of goods involved in this charge is enough to show injury to domestic commerce. The charge against petitioner involved only one watch and therefore, contends the government, the particular facts of petitioner's petty offense do not meet

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[4] The government asserts that the ATF position in the Sears case is being reconsidered (Br. in Opp. 6 n. 5). The only basis for this assertion is an affidavit of the prosecutor, not in the Sears case, but in the case against petitioner. That affidavit, made ten months ago, referred to no one in ATF with authority to make any change in the Bureau's position. Nothing has happened in the period of almost a year since the prosecutor prepared his affidavit to indicate that ATF is giving any thought to changing its position in the Sears matter.

For the convenience of this Court, a copy of the ATF ruling, exempting Sears from any disabilities under the Gun Control Act and the Bureau's subsequent reiteration of that view is reproduced (A-293-297) as an appendix to this reply brief (Appendix A-1-A-5, *infra*).

the grander dimensions of the charges against Sears. On this supposed factual distinction, the government argues that the two cases should have different outcomes. Sears should receive no sanction whatsoever for violating the Gun Control Act, while petitioner should serve three months in prison, followed by probation.

The "particular fact" argument advanced by the government does not comport with the exemption provision of the Gun Control Act. That Act exempts *offenses*, not on the basis of special facts about particular offenders, but on the basis of the legislative purpose of the statutes in question. Congress designed § 542 to aid in the enforcement of Customs laws by making false Customs statements a crime. Customs laws are mainly trade regulation provisions. The Sears case is an indistinguishable precedent that a § 542 violation, being part of the enforcement of a system to prevent unfair competition, is exempt from the category of predicate offenses under the Gun Control Act.

Petitioner reiterates that the scope of the exemption provision of the Gun Control Act is an important federal question which has not been but which should be resolved by this Court.

2. The second issue in this case arises under the Constitution. If petitioner's § 542 offense is held to be a predicate offense under the Gun Control Act, then the Act is unconstitutional. The unconstitutionality follows from irrational classification of non-violent trade regulation offenses and other similar non-violent offenses.

The government wholly fails to address the question presented. The government argues that Congress could rationally include non-violent crimes as predicate offenses under the Gun Control Act, a position that no one would

controvert. However, Congress did not elect to include all non-violent crimes as predicate offenses and, indeed, Congress did not elect to include all non-violent serious crimes. Congress chose rather to create a classification scheme for non-violent crimes that exempted a substantial number of non-violent and serious crimes, which this Court described as "business and commercial crimes." *Dickerson, Inc. v. New Banner Institute*, 103 S. Ct. 986, 988 n. 1). Having chosen that statutory scheme, Congress must have a rational basis for the classification. The government does not provide a single suggestion of what such a rational basis might be.[5]

3. The third issue in this case is whether hunting weapons are "firearms" under the Gun Control Act. Petitioner contends that the Gun Control Act, read as a whole, plainly evidences a legislative intent to exclude long guns that are intended for sporting use.

For the first time in this case, the government finally recognizes that the Act's definitions of "firearm" and "destructive device" are so related that a weapon excluded from "destructive device" would also be excluded from "firearm " (Br. in Opp. 10-11). This is a startling change in the government's position. In both courts below, the government argued that the exceptions to the definition of "destructive device" did not apply to the apparently separate definition of "firearm," for which the Act had no

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[5] Part of the government's gross misrepresentation of the facts of petitioner's previous conviction is brought to bear in this argument to support the proposition that petitioner had tried to smuggle a watch past Customs agents who prevented that attempt from succeeding by confrontation in which petitioner was threatened with a full body search (Br. in Opp. 8 n. 7). The implication is that petitioner's prior offense was not "non-violent" in nature. The prejudicial falsity of these factual assertions were dealt with earlier in this reply brief.

exceptions. The concession that the two provisions are interrelated, despite its lateness in coming, requires reversal of the conviction.

The government masks the effect of its belated awakening by contending that the weapons purchased by petitioner were not excepted from "destructive device" because petitioner has been charged, in a New York state proceeding, with using the weapons to assault and threaten other persons (Br. in Opp. 10 n. 9). These assault charges, argues the government, show that petitioner did not purchase the weapons for sporting purposes. But see (Pet. 18-19).

Once again the government, going outside the record, has grossly misrepresented the true facts. The incident that led to the assault charge occurred almost a month *after* petitioner had purchased the hunting weapons, and there is no basis for relating back anything which took place in that incident to petitioner's purpose in purchasing hunting weapons. Petitioner and others have already been tried on an assault charge arising from that incident and have been acquitted by the trial judge in November, 1983, who held that the prosecution's evidence was insufficient to go to the jury. The government, omitting reference to this acquittal, stated that there is a pending two-count indictment against petitioner outstanding in Putnam County, New York. On January 6, 1984, the Appellate Division of the Supreme Court of New York stayed prosecution of that indictment on the ground that defendant's acquittal of charges arising out of the same incident bars further prosecution. But what happened on October 24, 1982 is irrelevant to the original intent of petitioner at the time of purchase on October 8, 1982. The government's attempt

to prejudice petitioner by misstatements of matters *outside* the record is utterly reprehensible.

Apart from these misrepresentation of facts, the government makes no serious argument that the hunting weapons purchased by petitioner were not excepted from the Gun Control Act. The government does not even advert to the part of the Act creating an exception for hunting shotguns. As to hunting rifles, the government merely asserts conclusorily that this exception depends upon action by the Secretary of the Treasury, an erroneous view fully dealt with in the petition (Pet. 19-20).

The government's belated recognition that "firearm" and "destructive device" are integrally related underscores that importance of this question and the necessity for this Court to consider and decide the matter authoritatively.

This reply to the government's brief in opposition has called attention to the extreme lengths to which government counsel have gone to prejudice petitioner and to prejudice consideration of this petition in this Court. The only reason that suggests itself for the government's tactics is to prevent fair consideration of the important questions presented for review by certiorari in this Court. The disservice to this Court is beyond measure.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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1325 Spruce Street
Philadelphia, PA 19107

Counsel for Petitioner

APPENDIX

Dear

This refers to the correspondence which you have submitted to the Bureau which addresses the question (whether is precluded from obtaining Federal firearms licenses for the sales of firearms at new locations by reason of the fact that has been indicted under 18 U.S.C. § 371 and 542.) The materials you submitted indicated that the basis of the indictments returned against is that allegedly conspired to and did make false Customs declarations to avoid the assessment of antidumping duties on television receivers to be imported from Japan.)

(Under 18 U.S.C. § 921(a)(20), an indictment for a Federal or State offense pertaining to an unfair trade practice is not an indictment for a "crime punishable by imprisonment for a term exceeding one year" within the meaning of 18 U.S.C. Chapter 44. A federal firearms licensee is not, therefore, disabled as a result of such an indictment.)

(The antidumping duties were designed to help protect domestic industry by the elimination of unfair foreign competition. The circumstances which led to indictment under section 542 for allegedly entering merchandise into the commerce of the United States by means of false statements,) and hence those which led to the indictment based upon the alleged conspiracy to violate section 542, (are such that the indictments are for Federal offenses which "pertain to" unfair trade practices within the meaning of section 921(a)(20).) It follows that is not under a disability by reason of this indictment and that is not precluded from having its existing Federal firearms licenses renewed or being licensed at new business locations.

Appropriate officers of the Bureau responsible for the enforcement of Federal firearms laws are being advised concerning our determination of this matter.

If we can be of further assistance, please advise.

Sincerely yours,

(Signed) Robert J. Maxwell

Assistant Director
(Regulatory Enforcement)

Dear

This refers to your request for clarification from ATF as to which Federal offenses are not disabling offenses under the Federal firearms laws because they are exempted under 18 U.S.C. § 921(a)(20). In particular, you noted the question of "bid riggers."

Section 921(a)(20) provides in pertinent part:

> The term "crime punishable by imprisonment for a term exceeding one year" shall not include (A) any Federal or State offenses pertaining to antitrust violation, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate,...

The Secretary has not by regulation enumerated any such "similar offenses." The lack of any such regulation means that there are no "similar offenses" under section 921(a)(20) which are exempted from the term "crime punishable by imprisonment for a term exceeding one year." Therefore, the question becomes whether a particular offense is an offense pertaining to antitrust violations, unfair trade practices, or restraints of trade.

The term "antitrust laws" refers to statutes directed against unlawful restraints and monopolies. The goal of Federal antitrust laws is to safeguard the interplay of competitive forces in the far-flung commerce of the nation. *Cleary v. Chalk*, 488 F.2d 1315 (D.C. Cir. 1973). Unfair trade practices refers in general to the idea of unfair competition. The essence of the law in this area is insuring fair play among competitors and to the consumer by insuring that competition is vigorous but not deceptive. *Boston Pro Hockey v. Dallas Corp. & E. Manufacturing, Inc.*, 510

F.2d 1004 (5th Cir. 1975). The term "restraint of trade" has long had a definite meaning at common law, which was intentionally incorporated into the Sherman Act. That term is held to mean contracts or agreements for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrain production, and like practices which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from competition in the market. *Apex Hosiery Company v. Leader*, 310 U.S. 469, 497 (1940).

As indicated by the above, the category of offenses enumerated in section 921(a)(20) are closely related and are all directed at insuring the existence of a competitive marketplace. The legislative history of the Gun Control Act of 1968 indicates that section 921(a)(20) intended to exclude from its coverage only "offenses relating to antitrust violations and similar business offenses." *1968 U.S. Code Cong. & Ad. News* 4428. It was clearly not Congress' intent to include every offense relating to business within the exception contained in section 921(a)(20).

In accordance with the above, ATF has taken the position that violations of the Sherman Act and violations of 18 U.S.C. 542, the "antidumping" statute, are excepted from the term "crime punishable by imprisonment for a term exceeding one year" and hence are not disabling offenses under the Federal firearms laws. Additionally, we have taken the position that a conviction for conspiracy to violate the antitrust laws under 18 U.S.C. 371 is not a disabling offense because such a conviction is a conviction of an offense "pertaining to "anti-trust violations

within the meaning of section 921(a)(20). On the other hand, we have held that environmentla offenses, which related to public health and welfare, and violation of the anti-fraud provisions of the Securities Act of 1933 are not excepted.

As far as "bid rigging" is concerned, if the conviction involved is a conviction under the Sherman Act, then it would not be a disabling offense under the Federal firearms laws. On the other land, if the conviction is a conviction under some other statute, it would be necessary to examine the facts and circumstances of the particular case in accordance with the principles set forth above to determine whether the offense is one pertaining to antitrust violations, unfair trade practices, or restraints of trade.

If we can be of further assistance to you, feel free to contact us.

Sincerely yours,

Robert E. Sanders
Assistant Director
(Criminal Enforcement)